89- 1674
No.

In the
Supreme Court of the United States.

OCTOBER TERM, 1989.

ROSE CAROTA,
PETITIONER,

v.

THE CELOTEX CORPORATION,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petition for Writ of Certiorari.

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Question Presented.

Did the United States Court of Appeals for the First Circuit fail to follow the established precedent of this Court by holding that the admissibility of evidence of the Petitioner's pretrial settlements with joint tortfeasors was governed by the law of Massachusetts and not by Federal Rule of Evidence 408?

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No. .

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Supreme Court of the United States.

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v.

THE CELOTEX CORPORATION,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petition for Writ of Certiorari.

The Petitioner, Rose Carota, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above referenced matter on January 11, 1990.

Opinions Below.

The opinion of the First Circuit Court of Appeals at bar is reported at 893 F.2d 448 (1st Cir. 1990) and reproduced in the Appendix hereto (Appendix at 1A). The trial court's judgment was entered by the clerk on November 18, 1988.

Jurisdiction.

This Petition for Certiorari is taken pursuant to a judgment of the United States Court of Appeals for the First Circuit, entered on January 11, 1990, which affirmed a judgment entered in favor of the Respondent, The Celotex Corporation, by the United States District Court for the District of Massachusetts. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Statutory Provisions in Issue.

This Petition for Certiorari involves the application of Rule 408 of the Federal Rules of Evidence in civil actions arising under 28 U.S.C. § 1332. Federal Rule of Evidence 408 provides:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Statement of the Case.

This is a Petition for Writ of Certiorari for review of a decision by the United States Court of Appeals for the First Circuit that the admissibility of settlement evidence with joint tortfeasors in a diversity case is governed by the law of Massachusetts and not by Rule 408 of the Federal Rules of Evidence. The decision below was rendered in an appeal taken following a jury verdict and judgment in the United States District Court for the District of Massachusetts in favor of the Respondent, The Celotex Corporation. That judgment was affirmed by the Court of Appeals on January 11, 1990.

The Petitioner, Rose Carota, is the executrix of the estate of her late husband, Elio Carota. The case below sought damages for wrongful death, personal injuries and loss of consortium arising from Elio Carota's injurious exposure to asbestos in the course of his employment at the Fore River Shipyard in Quincy, Massachusetts. Mr. Carota was employed at the shipyard as an insulator, and in that capacity directly handled asbestos-containing products manufactured by a number of asbestos companies, including the Respondent's predecessor in interest. Each of these companies was named as a defendant in the Complaint.[1]

Prior to trial, the Petitioner settled her claims with all but two of the defendants named in the Complaint. The case proceeded to trial in November, 1988, against the Respondent, The Celotex Corporation.[2] At the start of the trial, the Respon-

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[1] The action was brought in the United States District Court for the District of Massachusetts pursuant to the District Court's diversity jurisdiction. 28 U.S.C. § 1332. The Petitioner is a citizen of the Commonwealth of Massachusetts and each of the defendants was incorporated and maintained its principal place of business in a state other than Massachusetts.

[2] The claims against the other defendant, Johns-Manville Sales Corporation, were previously severed after that defendant sought protection under the federal bankruptcy laws.

dent moved *in limine* for a ruling on the admissibility of the Petitioner's pretrial settlements with co-defendants. The Petitioner opposed the motion on the grounds that the admission of such evidence was expressly barred by Rule 408 of the Federal Rules of Evidence. Rule 408 provides in pertinent part:

> Evidence or (1) furnishing or offering or promising to furnish or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount.

The Petitioner pointed to the stated public policy against admitting evidence of settlements: they are "irrelevant, since the offer may be motivated by a desire for peace rather than from any concession of weakness of position . . . [and because its admission would undermine] the public policy favoring compromise and settlement of disputes." Federal Rule of Evidence 408, Advisory Committee's Notes.

Notwithstanding the express language of Federal Rule of Evidence 408, and the strong policies which underlie it, the Honorable Walter J. Skinner of the United States District Court for the District of Massachusetts granted the Respondent's motion. The District Court concluded that the admissibility of the settlement evidence was governed by the law of Massachusetts, which permits the introduction of such evidence.

At the close of the Respondent's case, the Respondent offered the evidence of the Petitioner's settlements with co-defendants. A general verdict was returned by the jury in favor of the Respondent and judgment was entered. The verdict was rendered without special interrogatories. Therefore, there is no way to find with fair assurance that the judgment was not

substantially swayed by the jury's knowledge of the pretrial settlements.

The Petitioner filed a timely appeal of the judgment in the United States Court of Appeals for the First Circuit. The sole issue on appeal was the admissibility of the settlement evidence, the admission of which substantially prejudiced the Petitioner's right to a fair trial. On January 11, 1990, the First Circuit held that the admissibility of the settlement evidence was governed by state law and not by the Federal Rules of Evidence, and therefore affirmed the judgment of the District of Massachusetts.

On April 10, 1990, the Petitioner filed this Writ of Certiorari in order to obtain review of the First Circuit's construction of the application of the Federal Rules of Evidence in cases arising under a district court's diversity jurisdiction.

Reasons for Granting Writ of Certiorari.

THE COURT OF APPEALS FOR THE FIRST CIRCUIT HAS FAILED TO FOLLOW THE ESTABLISHED PRECEDENT OF THIS COURT REGARDING THE CONSTITUTIONALITY OF A FEDERAL RULE WHICH CONFLICTS WITH STATE LAW.

This Petition raises for the first time whether the Federal Rules of Evidence can be applied constitutionally in diversity cases when they conflict with the rules of evidence of the forum state. In the matter before the Court, the First Circuit Court of Appeals held that the admissibility of settlement evidence in this diversity case was governed by the law of Massachusetts, which allowed the introduction of such evidence, and not by Federal Rule of Evidence 408, which would have expressly excluded it. If Federal Rule of Evidence 408 governed, as the Petitioner argued, then the settlement evidence

was inadmissible because of its highly prejudicial nature and the First Circuit was bound by its own precedent to vacate the judgment and remand the case for a new trial. The First Circuit's holding presents the classic error of supplanting a federal rule with state law when the federal rule merely alters the mode of enforcing state-created rights. In reaching this holding, the First Circuit failed to follow the established precedent of this Court. *Hanna* v. *Plumer*, 380 U.S. 460 (1965); *Walker* v. *Armco Steel Corp.*, 446 U.S. 740 (1980).

The decision of the First Circuit "has so far departed from the accepted and usual course of proceedings . . . as to call for an exercise of this Court's power of supervision." Sup. Ct. R. 17(a). The First Circuit has failed to give effect to the Federal Rules of Evidence in the matter at bar in precisely the same manner and circumstance that the court's failure to recognize the validity of Federal Rule of Civil Procedure 4(d)(1) gave rise to this Court's seminal decision in *Hanna* v. *Plumer*. Review of the First Circuit's decision will not only correct the injustice done to the Petitioner in this case by the improper admission of highly prejudicial evidence, but will also confirm the constitutionality of the Federal Rules of Evidence in diversity cases.

The sole issue on appeal before the First Circuit was whether the admissibility of out of court settlement evidence was governed by Federal Rule of Evidence 408[1] or the law of Massachu-

[1] Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable because it is presented in the course of compromise negotiations. This rule does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention

setts.[4] The First Circuit applied the rule of *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938) and its progeny to hold that the Massachusetts rule of evidence displaced Federal Rule of Evidence 408 because the court concluded that the federal rule impinged on some substantive state policy embodied in the state rule. The standard applied by the First Circuit, however, was simply not the appropriate test of the validity and application of a federal rule. *Hanna* v. *Plumer*, 380 U.S. at 470; *Walker* v. *Armco Steel Corp.*, 446 U.S. at 747-748.

The test applied by the First Circuit did not govern in this case because there was a federal rule which expressly covered the point in dispute. The fundamental flaw in the First Circuit's decision was

> the incorrect assumption that the rule of *Erie Railroad Co.* v. *Tompkins* constitutes the appropriate test of the validity and therefore the applicability of [a federal rule]. *The Erie rule has never been invoked to void a Federal Rule.* It is true that there have been cases where this Court has held applicable a state rule in the face of an argument that the situation was governed by one of the Federal Rules. But the holding of each such case was not that Erie commanded displacement of a Federal Rule by an inconsistent state rule, but rather that the scope of the Federal Rule was not as broad as the losing party urged, and therefore, there being no Federal Rule which cov-

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of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Fed. R. Evid. 408.

[4] Although the rules of evidence are not codified under Massachusetts law, the admissibility of evidence with joint tortfeasors is provided for in *Tritsch* v. *Boston Edison Company*, 363 Mass. 179 (1973).

> ered, the point in dispute, *Erie* commanded the enforcement of state law.

Hanna v. *Plumer*, 380 U.S. 469-70 (emphasis added).

There is no question that Federal Rule of Evidence 408 was broad enough to cover the issue in dispute. *See, e.g., McInnis* v. *A.M.F., Inc.*, 765 F.2d 240, 247 (1st Cir. 1985) (Rule 408 governs the admissibility of settlement between a litigant and a third party). *See, also* Federal Rule of Evidence 408, Advisory Committee's Notes. Accordingly, the proper test of the applicability of the federal rule at issue in the case at bar was not the rule of *Erie*, but the test set forth in *Hanna* v. *Plumer*:

> When a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively un-guided *Erie* choice: the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court and Congress erred in their *prima facie* judgment that the Rule in question transgresses neither the term of the Enabling Act nor constitutional restrictions.

Hanna v. *Plumer*, 380 U.S. at 471 (construing the constitutionality of Federal Rule of Civil Procedure 4(d)(1) in a diversity case). *Hanna* instructs that where the issue is covered by a federal rule, the sole question for the court is whether the enactment of the rule was within the constitutional power of Congress.[5] *Hanna* v. *Plumer*, 380 U.S. at 470-72; *Walker* v. *Armco Steel Corp.*, 446 U.S. at 748.

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[5] Federal rules promulgated by the Supreme Court pursuant to the Rules Enabling Act, must also come within the limitations of that Act prohibiting rules which "abridge, enlarge or modify any substantive right . . ." 28 U.S.C. § 2072. *Hanna* v. *Plumer*, 380 U.S. at 470-72 (applying such restrictions to the Federal Rules of Civil Procedure). That limitation does not apply to the Federal Rules of Evidence, which were enacted directly by Congress.

Moreover, the validity of the federal rule is established if it can "rationally" be classified as procedural, even though it may differ from the comparable state rule. As this Court observed in *Hanna*, inherent in Congress' power to create federal courts is the power to promulgate rules for application therein.

> [T]he constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.

Hanna v. *Plumer*, 380 U.S. at 472. The enactment of the Federal Rules of Evidence was unquestionably a valid exercise of that power.

The test set forth in *Hanna* v. *Plumer* applies with equal force to the Federal Rules of Evidence. *Flaminio* v. *Honda Motor Co.*, 733 F.2d 463, 470-72 (7th Cir. 1984); *Fasanaro* v. *Mooney Aircraft Corp.*, 687 F. Supp. 482, 485 n.3 (N.D. Cal. 1988); *Rioux* v. *Daniel Intern. Corp.*, 582 F. Supp. 620, 624-25 (D. Me. 1984). Indeed, even the First Circuit had previously recognized "the test to be fully applicable to the Federal Rules of Evidence as well." *McInnis* v. *A.M.F., Inc.*, 765 F.2d 240, 245 n.5 (1st Cir. 1985).[6]

Courts that have applied the *Hanna* test to the Federal Rules of Evidence have consistently found those rules to be constitutional. For example, in *Flaminio* v. *Honda Motor Co.*, 733

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[6] "[T]he presumption of validity may be even stronger in the case of the Federal Rules of Evidence, since unlike the rules of civil procedure, they were actually written rather than merely approved by Congress." *McInnis* v. *A.M.F., Inc.*, 765 F.2d at 245 n.5. *Accord, Fasanaro* v. *Mooney Aircraft Corp.*, 687 F. Supp. at 485 n.3.

F.2d at 471-72, the Seventh Circuit held that Federal Rule of Evidence 407 ("Subsequent Remedial Measures") had both procedural and substantive considerations, and therefore, under *Hanna*, could be applied constitutionally in a diversity case even though the forum provided a contrary rule. *Accord, Fasanaro* v. *Mooney Aircraft Corp.*, 687 F. Supp. at 483-86; *Rioux* v. *Daniel Intern. Corp.*, 582 F. Supp. at 624-25 (also analyzing Rule 407). *But see, Moe* v. *Avions Marcel Dassault-Breguet Aviation*, 727 F.2d 917 (10th Cir.) *cert. denied*, 469 U.S. 853 (1984) (classifying Rule 407 as purely substantive).

Federal Rule of Evidence 408 has also been applied constitutionally in the face of a contrary state rule. *McHann* v. *Firestone Tire & Rubber Co.*, 713 F.2d 161 (5th Cir. 1983). The procedural considerations which underlie Federal Rule of Evidence 408 establish its constitutionality in diversity cases. As the Fifth Circuit held in *McHann*, "the efficient use of court time and resources is a federal concern legitimately within the reach of the federal authority and that Rule 408 promotes efficiency by fostering out-of-court settlements." *Id.* at 166 n.10. *Accord, McInnis* v. *A.M.F.*, 765 F.2d at 247.

The First Circuit failed to apply the *Hanna* test when it considered the validity and application of Federal Rule of Evidence 408 to the case at bar. Although the court recognized that the issue of "[o]ut of court settlements [was] 'rationally capable of classification as either' substantive or procedural," *Carota* v. *Johns Manville Corp.*, 893 F.2d 448, 450 (1st Cir. 1990) reproduced and attached to the Petition at Appendix 1a, at 4a, it did not apply the *Hanna* test. Instead, the court applied a different test: whether the federal rule "impinge[d] on some substantive state policy embodied in the state rule." *Id.* at 450-51. That was error.[7] In reaching this result, the First Circuit

[7] Even under the improper test adopted by the First Circuit, the court should have concluded that Federal Rule of Evidence 408 governed and precluded the admission of the pretrial settlements. As the Petitioner proposed, the District

ignored this Court's clear admonition in *Hanna* v. *Plumer* that a federal rule is not unconstitutional simply because it may in some way affect a state created right. *Id.* at 473.[8] To hold that a Federal Rule of Evidence "must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel the Constitution's grant of power over federal [rulemaking] or Congress' attempt to exercise that power." *Id.* at 473-74. That is precisely the result of the First Circuit's decision at bar.

The federal/state distinction at bar is precisely the type of minor alteration of the mode of enforcing state-created rights that this Court made clear in *Hanna* does not result in the invalidation of a federal rule. The difference between the procedure under Rule 408 and state law regarding the handling of pretrial settlements was simply the mode by which the state substantive policy of preventing double recovery was to be accomplished. Indeed, the difference between the state and federal practice was actually just the method by which a damage award is adjusted to reflect undisputed pretrial settlements. Massachusetts law provides that the jury makes the adjustment; the practice under Rule 408 would leave that arithmetic to the

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Court could have deducted the amount of the settlement from the verdict. This would have achieved the state substantive policy of avoiding double recovery without undermining the legitimate goals of the federal rule. Thus, the application of Federal Rule of Evidence 408 would not have impinged on any substantive state policy.

[8] In contrast to the First Circuit's decision below, the Seventh Circuit has correctly applied the test in *Hanna* v. *Plumer* to the Federal Rules of Evidence.

> We are reluctant to cast a cloud over the whole federal rule making enterprise and open a new chapter in constitutional jurisprudence by holding that a procedural rule is beyond even the power to Congress to enact for application to diversity cases, because the rule affects substantive questions that the *Erie* doctrine reserves to the states.

Flaminio v. *Honda Motor Co.*, 733 F.2d 463, 473 (7th Cir. 1984) (upholding the constitutionality of Rule 407).

trial court.[9] The latter "is the proper procedure for guarding against over compensation when Rule 408 precludes the admission of a settlement agreement." *McInnis* v. *A.M.F., Inc.*, 765 F.2d at 251. *Accord, McHann* v. *Firestone Tire & Rubber Co.*, 713 F.2d at 166. Surely, the choice between the state method and the procedure used when Rule 408 precludes the admission of settlement evidence "would be of scant, if any, relevance to the choice of the forum . . ." *Hanna* v. *Plumer*, 380 U.S. at 469. Therefore, the application of Federal Rule of Evidence 408 in the case at bar would not have encouraged forum shopping or resulted in the inequitable administration of the laws. *Id.* at 468.

The issue at bar satisfies the two-prong test formulated in *Hanna* v. *Plumer*. Federal Rule of Evidence 408 was broad enough to cover the admissibility of the settlements in the case at bar and the issue was rationally capable of classification as either substantive or procedural. Accordingly, under *Hanna*, the First Circuit should have concluded that Federal Rule of Evidence 408 was valid and controlled the admissibility of the pretrial settlements. Further, the court would then have been compelled to conclude by its own precedent that the admission of the settlement evidence constituted prejudicial error which mandated a new trial. *McInnis* v. *A.M.F., Inc.*, 765 F.2d at 251. *Accord, McHann* v. *Firestone Tire & Rubber Co.*, 713 F.2d 161, 166 (5th Cir. 1983).

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[9] The Massachusetts rule of admissibility is therefore not one of those rare evidentiary rules which is so bound up with state substantive law that federal courts sitting in diversity must apply it to give full effect to the state's substantive policy. *Compare, Conway* v. *Chemical Leaman Tank Lines, Inc.*, 540 F.2d 837 (5th Cir. 1976) (admission of evidence of remarriage to prevent misleading impression of continuing widowhood expressly provided for under the Texas wrongful death statute); *DiAntonio* v. *Northampton Accomack Memorial*, 628 F.2d 287 (4th Cir. 1980) (admissibility of report of medical malpractice panel was so essential to ensure meaningful implementation of Virginia Medical Malpractice Act that its admission was expressly provided for in the statute).

Conclusion.

The First Circuit has modified the constitutional test for the validity of federal rules as formulated in *Hanna* v. *Plumer*, 380 U.S. 460 (1965). In doing so, the court has ignored the established precedent in both this Court and its own circuit. The First Circuit has made this substantial departure from established precedent to resolve a conflict between state and federal law that could have been readily accommodated by a mechanical change in court process. This Court should grant the Petition for Writ of Certiorari, vacate the decision below, and remand this case to the First Circuit for further review consistent with the standards set forth in *Hanna* v. *Plumer*.

Respectfully submitted,

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Appendix.

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Appendix.

Rose Carota, Plaintiff, Appellant,

v.

Johns Manville Corp., et al.,
Defendants, Appellees.

No. 89-1286.

United States Court of Appeals,
First Circuit.

Heard Sept. 12, 1989.

Decided Jan. 11, 1990.

Neil T. Leifer, with whom Thornton & Early, Boston, Mass., was on brief, for plaintiff, appellant.

Leonard F. Zandrow, Jr., with whom Richard L. Neumeier, Thomas P. O'Reilly, Janet L. Maloof, and Parker, Coulter, Daley & White, Boston, Mass., were on brief, for defendants, appellees.

Before BOWNES, TORRUELLA and MAYER,* Circuit Judges.

TORRUELLA, Circuit Judge.

Plaintiff-appellant appeals from a jury verdict in a wrongful death case. She argues that the United States District Court for the District of Massachusetts improperly admitted evidence of out of court settlements in violation of Federal Rule of Evidence 408 causing substantive prejudice and therefore requests a new trial.

Elio Carota and his wife, Rosa, commenced this action in 1982. In 1986, Elio Carota died, allegedly of asbestosis, and Mrs. Carota amended the complaint to reflect her husband's

* Of the Federal Court, sitting by designation.

death. The trial began in November, 1988. By that time, Mrs. Carota had already settled with the original defendants, leaving appellee, The Celotex Corp. (Celotex), as the only remaining defendant.

At the beginning of the trial, Celotex moved to introduce into evidence the amount of Mrs. Carota's settlements with the other defendants. Celotex argued that under Massachusetts law a defendant is entitled to show evidence of out of court settlements in joint tortfeasor cases. *Tritsch v. Boston Edison Company*, 363 Mass. 179, 182, 293 N.E.2d 264, 267 (1973).

Mrs. Carota opposed this motion, arguing that Fed.R.Evid. 408 precludes admitting evidence of settlements with third parties. Federal Rule of Evidence 408 provides in pertinent part:

> Evidence of (1) furnishing or offering or promising to furnish or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount.

She argued that settlements are "irrelevant, since the offer may be motivated by a desire for peace rather than from any concession of weakness of position . . . [and because its admission would undermine] the public policy favoring the compromise and settlement of disputes." Rule 408: *Advisory Committee Notes on Proposed Rules*.

The district court granted Celotex's motion, and Celotex concluded its case by publishing to the jury the stipulated fact that Mrs. Carota had received $98,471 in settlement with other defendants. This settlement amount appeared on the general verdict form following the space where the jury was to enter an award of compensatory damages. After the jury returned a verdict for Celotex, Mrs. Carota brought this appeal.

The issue on appeal is whether the district court erred in admitting the evidence of third party settlements, and, if erroneously admitted, whether the presence of this evidence warrants a new trial.

DISCUSSION

In *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), the Supreme Court held that a federal court sitting in a diversity case must apply state substantive law and federal procedural law. While "no one doubts federal power over procedure," *Id.* at 92, 58 S.Ct. at 828 (Reed, J., concurring) "federal courts and Congress are constitutionally precluded from displacing state substantive law with federal substantive rules in diversity actions." *McInnis v. A.M.F., Inc.*, 765 F.2d 240, 244 (1st Cir. 1985). *See also Ricciardi v. Children's Hospital Medical Center*, 811 F.2d 18, 21 (1st Cir. 1987). This substantive/procedural dichotomy has long served as a guiding light for federal courts deciding issues of federalism.

"[L]aws which fix duties, establish rights and responsibilities among and for persons . . . are 'substantive laws' in character while those which merely prescribe the manner in which such rights and responsibilities may be exercised and enforced in a court are 'procedural laws'." *Black's Law Dictionary* 1083 (5th ed. 1979). Generally, rules of evidence are procedural, since they describe the admissibility, relevancy, weight and sufficiency of information utilized at trial to define substantive rights. *See generally* 21 C. Wright & K. Graham, *Federal Practice and Procedure*, §§ 5001 *et seq.* (1980). The law of damages, however, is substantive since it prescribes what, if any, money a plaintiff will receive as compensation for injury. "Damages are an element of plaintiff's case. . . ." *Goldstein v. Kelleher*, 728 F.2d 32, 38 (1st Cir. 1984). *Heddinger v.*

Ashford Memorial Community Hosp., 734 F.2d 81 (1st Cir. 1984). *See also, e.g., Cordeco Development Corp. v. Santiago Vásquez*, 539 F.2d 256, 262 (1st Cir. 1976). *Colonial at Lynnfield Inc. v. Sloan*, 870 F.2d 761 (1st Cir. 1989).

Certain matters do not fall neatly into the substantive/procedural dichotomy, but rather fall within a twilight zone between both classifications. The present case presents such a matter. Out of court settlement evidence is "rationally capable of classification as either" substantive or procedural. *Hanna v. Plumer*, 380 U.S. 460, 472, 85 S.Ct. 1136, 1144, 14 L.Ed.2d 8 (1965). Thus, the traditional *Erie* analysis cannot resolve the dispute. But, the *Erie* doctrine has evolved beyond its traditional confines, to the point where this Court held in *Ricciardi v. Children's Hospital Medical Center*, 811 F.2d at 21, that the state rule need not always displace the federal rule, unless application of the federal rule "impinges on some substantive state policy embodied in the state rule." *Id.* Therefore, the fact that both parties concede the issue is substantive, does not end our inquiry.

Appellant argues that the state policy at stake is prevention of double recovery, and that this Court can accommodate this policy while still applying Rule 408. In *Tritsch v. Boston Edison Company*, 363 Mass. 179, 182, 293 N.E.2d 264, 267 (1973), a joint tortfeasor case, the Massachusetts Supreme Judicial Court (SJC), concerned about a plaintiff receiving "remuneration in excess of his actual damages" held that "[i]n mitigation of damages, a defendant is entitled to show in evidence the amount of money paid or promised to the plaintiff by a joint tortfeasor on account of the same injury." In the same case on appeal, asking for a reduction in the verdict, the SJC stated:

> "[s]everal of our cases indicate that settlement with a joint tortfeasor not a party to the action may be disclosed to the jury in order that they may adjust their verdict. . . . These cases suggest that the jury should subtract the amount received in settlement from the total damages in arriving at their verdict."

Boston Edison Company v. Tritsch, 370 Mass. 260, 266, 346 N.E.2d 901, 905 (1976).

The appellant contends that Massachusetts law, relying on the cases cited above, points to a substantive policy of prevention of double recovery. To implement this policy, appellant argues Massachusetts instituted a procedural mechanism of allowing out of court settlements into evidence and requiring the jury itself to deduct these amounts from their verdict. Under this interpretation, application of the Rule 408 procedure does not impinge on the state substantive policy of prevention and double recovery. By withholding out of court settlement information from the jury, and then deducting from the verdict the amount of any such settlement, the state policy, appellant contends, can be reconciled with the federal rule. *See McHann v. Firestone & Rubber Co.*, 713 F.2d 161, 166 n.10 (5th Cir. 1983).

Appellee argues that Massachusetts law is clearly substantive because it directly affects the award of damages and opines that application of the federal law would indeed violate substantive state policies. *See Tritsch v. Boston Edison Co.*, 363 Mass. 179, 182, 293 N.E.2d 264, 267 (1973); *Boston Edison Company v. Tritsch*, 370 Mass. 260, 266, 346 N.E.2d 901, 905 (1976). Appellee contends that in Massachusetts, the jury is entitled to hear out of court settlement evidence and is expected to adjust their verdict accordingly.

"Fact finding is the essence of the jury function," *Estate of Spinosa*, 621 F.2d 1154, 1160 (1st Cir. 1980), and the jury must

make the determination of damages. *See McDonald v. Federal Laboratories, Inc.*, 724 F.2d 243, 247 (1st Cir. 1984). Procedural issues are the province of the court. Consequently, the decision to grant juries the opportunity to hear settlement evidence reflects a view of that evidence as substantive, because the juries' hearing of this evidence affects the substantive rights of plaintiffs to damages. Otherwise, it would have been excluded as procedural. Allowing a deduction of out of court settlements from a verdict, while not informing the jury of the amounts of those settlements, deprives the jury of their state law entitlement to hear the evidence, thwarts the rationales behind Massachusetts Supreme Judicial Court decisions, and usurps from that court the power to formulate its own policies and to give force to its own law.

As previously stated, the issue of out of court settlements as evidence falls within the twilight zone between substance and procedure. But when a state permits the admission of out of court settlement evidence with the intent that such admission affect the damage award, then we must deem the issue substantive. If a state has a substantive policy to have a jury hear out of court settlement evidence when determining damage awards, we will not contravene that state law in a diversity action. The court below recognized that Massachusetts law required the jury to "[t]ake them [out of court settlements] into consideration when an award is made." We agree.

Affirmed.

(2)

No. 89-1674.

In the

Supreme Court of the United States.

OCTOBER TERM, 1989.

ROSE CAROTA,
PETITIONER,

v.

THE CELOTEX CORPORATION,
RESPONDENT.

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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Question Presented for Review.

Did the United States Court of Appeals for the First Circuit correctly decide in this diversity jurisdiction case that the admissibility of the evidence that the plaintiff had settled with certain defendants prior to the trial represented a matter of substantive Massachusetts law, rather than a matter controlled by Rule 408 of the Federal Rules of Evidence?

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CASES.

STATUTORY PROVISIONS AND RULES.

OTHER AUTHORITIES.

No. 89-1674.

In the
Supreme Court of the United States.

OCTOBER TERM, 1989.

ROSE CAROTA,
PETITIONER,

v.

THE CELOTEX CORPORATION,[1]
RESPONDENT.

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Statement of the Case.

This case involves the issue of whether a single-sentence reference to the fact that the plaintiff settled certain claims

[1] For the limited purposes of Supreme Court Rule 28.1, The Celotex Corporation might be regarded as a wholly owned subsidiary of the Jim Walter Corporation.

with other defendants, which was presented to the jury in the form of a "stipulation," constituted reversible error requiring a new trial. As discussed *infra*, this evidence did *not* violate either the applicable state or federal law, and the First Circuit Court of Appeals did *not* apply an incorrect standard of review in analyzing the admissibility of this evidence.

The respondent The Celotex Corporation ("Celotex") submits that the propriety of the First Circuit Court of Appeals' analysis of the applicable law, as reported in this case in *Carota* v. *Johns Manville Corp.*, 893 F.2d 448 (1st Cir. 1990) and as also set forth in the appendix to the petitioner Rose Carota's ("petitioner") petition for writ of certiorari, stands on its own with little need for commentary or explanation from Celotex. Celotex submits this opposition, however, to address and clarify certain allegations contained in the petition, which may not be readily apparent or refuted by the text of the circuit court's opinion in this case. See *Carota* v. *Johns Manville Corp.*, *supra* at 448-451.

Celotex adopts the petitioner's statements regarding "jurisdiction" and "statutory provisions in issue." Celotex also adopts the petitioner's "statement of the case" with the following exceptions.

First, the petitioner did not object to this case being submitted to the jury on a general verdict basis only. See Petition for Writ of Certiorari, p. 4. Relatedly, the petitioner did not suggest that any specific interrogatories be submitted to the jury, pursuant to Fed. R. Civ. P. 49 or otherwise, to aid in the rendition of a verdict. Accordingly, any complaint by the petitioner that it is impossible to isolate what influence, if any, the pretrial settlement evidence had upon the jury in this case has not been preserved for appellate review. See Petition for Writ of Certiorari, pp. 4-5.

Second, and more importantly, the petitioner's premise that the admission of the pretrial settlement evidence in this case

substantially prejudiced her right to a fair trial, see Petition for Writ of Certiorari, pp. 5, 6, 12, 13, is incorrect. In this regard, it is an erroneous characterization of the record that "[t]he sole issue on appeal before the First Circuit was whether the admissibility of out of court settlement evidence was governed by Fed. R. of Evid. 408 or the law of Massachusetts."[2] See Petition for Writ of Certiorari, pp. 6-7. See also *id.*, p. 5. To the contrary, and in order to place this petition in a proper context, this Court should be aware that two alternative issues were extensively presented to the circuit court, and these two alternative issues remain potentially applicable if this Court were ultimately to grant the petitioner the relief requested in this case.

The first alternative issue previously raised before the circuit court was that, even if Fed. R. of Evid. 408 was applicable in this case, its provisions were not violated in the circumstances. Regarding this alternative issue, Celotex previously argued that Fed. R. of Evid. 408, by its own terms, permits the offer of settlement evidence for purposes other than proving the validity or invalidity of a claim. See Fed. R. of Evid. 408, sen. 4. Celotex argued that the settlement evidence in this case was properly offered for such "other purpose[s]" within the meaning of Fed. R. of Evid. 408, namely, for the purpose of mitigating potential damages. Celotex noted that, in general, there were a substantial number of federal cases construing Fed. R. of Evid. 408 in which settlement evidence was admitted under the rule and that, when admitted,

[2] The petitioner has apparently conceded in her petition, as she had done before the circuit court, that the admission of the pretrial settlement evidence in this case was proper — if Massachusetts law is considered applicable. See Petition for Writ of Certiorari, pp. 6-7, n.4; *Tritsch* v. *Boston Edison Co.*, 363 Mass. 179, 182, 293 N.E.2d 264, 267 (1973) ("In mitigation of damages, a defendant is entitled to show in evidence the amount of money paid or promised to the plaintiff by a joint tortfeasor on account of the same injury.").

deference was given to the sound discretion of the trial judge whose decision was not overturned absent a showing of abuse.[3]

The second alternative issue previously raised before the circuit court was that, even if the admission of the settlement evidence in this case was regarded as erroneous pursuant to Fed. R. of Evid. 408, the error was harmless and did not affect

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[3] In its brief to the circuit court, Celotex identified the following cases in which the federal courts have admitted evidence of settlements pursuant to the "other purpose[s]" provisions of Fed. R. of Evid. 408. *Belton* v. *Fibreboard Corp.*, 724 F.2d 500, 504-505 (5th Cir. 1984) (evidence that other asbestos manufacturers had settled with plaintiff admissible to explain to jury why other defendants were not in court and to prevent confusion); *Breuer Electric Manufacturing Co.* v. *Toronado Systems of America, Inc.*, 687 F.2d 182, 185 (7th Cir. 1982) (evidence of settlement negotiations admissible in hearing to set aside default to show defendants' awareness of claim); *Central Soya Co., Inc.* v. *Epstein Fisheries, Inc.*, 676 F.2d 939, 944 (7th Cir. 1982) (evidence of settlement admissible to show partial forgiveness of primary debt in guaranty case); *In Re General Motors Corp. Engine Interchange Litigation*, 594 F.2d 1106, 1124 (7th Cir. 1979), *cert. denied*, 444 U.S. 870 (1979) (evidence of negotiations admissible on issue of fairness of partial settlement in class action); *John McShain, Inc.* v. *Cessna Aircraft Co.*, 563 F.2d 632, 635 (3d Cir. 1977) (evidence of settlement admissible to show bias or prejudice of a witness); *B&B Investment Club* v. *Kleinert's, Inc.*, 472 F. Supp. 787, 791 (E.D. Pa. 1979) (evidence of settlement discussions admissible to show that negotiation of class action was not successful). See also *Cassino* v. *Reichhold Chemicals, Inc.*, 817 F.2d 1338, 1342 (9th Cir. 1987); *Bradbury* v. *Phillips Petroleum Co.*, 815 F.2d 1356, 1363-1364 (10th Cir. 1987); *Bituminous Const., Inc.* v. *Rucker Enterprises, Inc.*, 816 F.2d 965, 968-969 (4th Cir. 1987); *Crues* v. *KFC Corp.*, 768 F.2d 230, 233 (8th Cir. 1985); *Brocklesby* v. *United States*, 767 F.2d 1288, 1292-1293 (8th Cir. 1985); *In Re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238, 275 (3d Cir. 1983).

In addition, Celotex argued that, when the question of the admissibility of a prior settlement is raised pursuant to the provisions of Fed. R. of Evid. 408, this issue represents a matter "resting in the sound discretion of the trial court which should use its best judgment as to which procedure is more appropriate under the circumstances of the particular case." *Sharp* v. *Hall*, 482 F. Supp. 1, 2 (E.D. Okla. 1978). See also *Weir* v. *Federal Ins. Co.*, 811 F.2d 1387, 1396 (10th Cir. 1987) (decision to exclude or admit evidence regarding settlement, pursuant to Fed. R. Evid. 408, is within sound discretion of trial judge and will not be reversed by Court of Appeals absent clear abuse of discretion); *Kennon* v. *Slipstreamer, Inc.*, 794 F.2d 1067, 1069-1070 (5th Cir. 1986) (same).

the petitioner's substantial rights in the underlying circumstances.[4] In this regard, Celotex argued that the settlement evidence in this case was innocuously presented in the form of a single-sentence "stipulation" during the course of a week long trial, and no emphasis was placed on it. Ironically, if the jury misapplied the settlement evidence to liability issues, rather than to damages issues as they had been specifically instructed to do by the trial judge, this misapplication would have tended to undermine, rather than bolster, Celotex's predominant defense theories at trial. These defense theories were that the petitioner's decedent had not suffered an asbestos-related disease at all and, alternatively, that his health risks, if any, could not have been anticipated given the "state of the art" regarding medical knowledge of asbestos at the time of his alleged exposure. In addition, any purported error in the introduction of the settlement evidence at the trial would have been cured by the trial judge's clarifying instructions to the jury

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[4] Celotex argued that, even if the admission of the settlement evidence was considered erroneous in this case, this finding alone would not warrant the award of a new trial. See Fed. R. of Evid. 103(a) (evidentiary ruling is not reversible error "unless a substantial right of the party is affected"); 28 U.S.C. § 2111 (appellate court should render judgment "without regard to errors or defects which do not affect the substantial rights of the parties"). As the First Circuit Court of Appeals properly recognized in a prior case, the applicable standard of review "for determining whether the admission of such evidence is harmless error is whether [the court] can say 'with fair assurance . . . that the judgment was not substantially swayed by the error . . .'" *Lataille* v. *Ponte*, 754 F.2d 33, 37 (1st Cir. 1985), quoting *Kotteakos* v. *United States*, 328 U.S. 750, 765, 66 S. Ct. 1239, 1248 (1946), *United States* v. *Pisari*, 636 F.2d 855, 859 (1st Cir. 1981). In this regard, "[t]he centrality of the evidence, its prejudicial effect, whether it is cumulative, the use of the evidence by counsel, and the closeness of the case are all factors which bear on this determination." *Lataille* v. *Ponte, supra* at 37, citing 1 J. Weinstein & M. Berger, *Weinstein's Evidence* § 103[06] at 103-61 to 103-63 (1982). See, by analogy, *Branch* v. *Fidelity & Casualty Co. of New York*, 783 F.2d 1289, 1294 (5th Cir. 1986) (error in admitting settlement evidence pursuant to Fed. R. of Evid. 408 was harmless in circumstances); *Triangle Mining Co., Inc.* v. *Stauffer Chemical Co.*, 753 F.2d 734, 743 (9th Cir. 1985) (same).

in this case about such evidence. Celotex also argued that the petitioner could not fairly complain on appeal that the trial judge's clarifying instructions were inadequate or that his use of a general verdict form was improper, because her counsel had failed to make such objections at the trial.

In view of the extensive presentation of these alternative issues to the circuit court in this case, it is presumptuous for the petitioner to speculate (see petition, pp. 5-6, 12, 13) that, if the circuit court had ruled that Fed. R. of Evid. 408 applied in this case, "the court would then have been compelled to conclude by its own precedent that the admission of the settlement evidence constituted prejudicial error which mandated a new trial." See Petition for Writ of Certiorari, p. 12. There is simply no indication in the reported decision that, if Fed. R. of Evid. 408 in actuality applied in this case, the circuit court otherwise considered the exceptions contained within Rule 408, sen. 4 to be inapplicable or that, in any event, the circuit court considered the settlement evidence to be substantially prejudicial. See *Carota* v. *Johns Manville Corp.*, 893 F.2d at 448-451.

Reasons Why Writ of Certiorari Should Be Denied.

THE FIRST CIRCUIT COURT OF APPEALS CORRECTLY FOLLOWED THE ESTABLISHED PRECEDENT OF THIS COURT IN DECIDING THIS CASE.

This petition raises a routine question, namely, the application of substantive state law in federal court cases based upon diversity jurisdiction. Contrary to the petitioner's allegations,

this petition does not raise any "first time" issues of significance nor has the circuit court's decision in this case "so far departed from the accepted and usual course of judicial proceedings . . ." as to warrant or require intervention by this Court. See Supreme Court Rule 17.1(a). See generally *Pennsylvania* v. *Bruder*, 109 S. Ct. 205, 208 (1988) (Stevens, J., dissenting).

The petition mischaracterizes the decision of the circuit court in this case. See *Carota* v. *Johns Manville Corp., supra* at 448-451. There is no support in the language of the reported decision for the petitioner's intimations that the circuit court ruled that the Federal Rules of Evidence in diversity cases generally, see Petition for Writ of Certiorari, p. 6, or that Fed. R. of Evid. 408 specifically, see *id.*, pp. 10-11, were "unconstitutional." To the contrary, the circuit court in this case merely, and quite narrowly ruled that, in diversity jurisdiction cases, the federal courts may appropriately apply the substantive law of the forum state, particularly where that law represents an important and well established state policy, even though the substantive state law may otherwise conflict with federal law. See *Carota* v. *Johns Manville Corp., supra* at 451.

The circuit court in *Carota* did not modify the time-honored tests for determining the application of federal and state law in diversity jurisdiction cases announced by this Court in *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938) and *Hanna* v. *Plumer*, 380 U.S. 460 (1965), as the petitioner alleges. See Petition for Writ of Certiorari, pp. 10, 13. In *Erie Railroad Co.*, this Court ruled that a federal court setting in a diversity case must apply state substantive law. *Erie Railroad Co.* v. *Tompkins, supra* at 78. More recently, this Court clarified that the intent of the *Erie Railroad Co.* decision "was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome

of a litigation, as it would be if tried in a State court." *Walker* v. *Armco Steel Corp.*, 446 U.S. 740, 746 (1980), quoting *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 109 (1945). See also *Hanna* v. *Plumer*, 380 U.S. at 468 (recognizing twin aims of *Erie* rule: discouragement of forum shopping and avoidance of inequitable administration of law). In this case, the circuit court expressly cited, and correctly applied, the principles set forth by this Court in the *Erie Railroad Co* and the *Hanna* cases. See *Carota* v. *Johns Manville Corp.*, 893 F.2d at 450-451.

The fact that the circuit court in *Carota* noted that the issue of pretrial settlement evidence may "not fall neatly into the substantive/procedural dichotomy," *id.* at 450, does not indicate, as the petitioner implies (see petition, p. 10), that the circuit court ultimately abandoned the "substantive/procedural" test adopted by this Court in *Erie Railroad Co.* and in *Hanna*. In the *Hanna* case itself, this Court recognized that "[t]he line between 'substance' and 'procedure' shifts as the legal context changes." *Hanna* v. *Plumer, supra* at 471.[5] The *Hanna* court concluded that many legal principles should be seen as "falling within the uncertain area between substance and procedure . . . rationally capable of classification as either." *Id.* at 472. In the specific context of Fed. R. of Evid. 408, moreover, leading commentators have recognized that "Rule 408 surely

[5] In this regard, the petitioner's reliance upon the *Flaminio, Fasanaro, Rioux*, and *Moe* cases, see Petition for Writ of Certiorari, pp. 9-10, is misplaced because each of these cases construe Fed. R. of Evid. 407, not Fed. R. of Evid. 408, and thus involve an inapposite "legal context," i.e., evidence of subsequent remedial measures. *Hanna* v. *Plumer, supra* at 471. See contrastingly *Flaminio* v. *Honda Motor Co.*, 733 F.2d 463, 470-472 (7th Cir. 1984) (construing Fed. R. of Evid. 407); *Fasanaro* v. *Mooney Aircraft Corp.*, 687 F. Supp. 482, 485 n.3 (N.D. Cal. 1988) (same); *Rioux* v. *Daniel Intern. Corp.*, 582 F. Supp. 620, 624-625 (D. Me. 1984) (same); *Moe* v. *Avions Marcel Dassault-Breguet Aviation*, 727 F.2d 917, 932-933 (10th Cir.), *cert. denied*, 469 U.S. 853 (1984) (classifying Fed. R. of Evid. 407 as substantive).

falls into that area in which the *Hanna* decision gave Congress an option to treat rules as either substantive or procedural." 23 C. Wright & K. Graham, *Federal Practice and Procedure: Evidence* § 5315 (1980). See also Note, "Rule 408 and *Erie*: The Latent Conflict," 12 Ga. L. Rev. 275, 293 (1977) (fact that issue may have some procedural aspect cannot alone provide excuse for disregard of state substantive law).[6] The circuit court in *Carota* simply recognized that Fed. R. of Evid. 408 represented an area of law which was not readily classified as being either purely substantive or purely procedural. See *Carota* v. *Johns Manville Corp.*, 893 F.2d at 450.

It is clear from the circuit court's decision in *Carota*, however, that the court ultimately concluded that the issue of the admissibility of settlement evidence was substantive in nature and that substantive Massachusetts law thus applied in this case:

> "[W]hen a state permits the admission of out of court settlement evidence with the intent that such admission affect the damage award, then we must deem the issue substantive. If a state has a substantive policy to have a jury hear out of court settlement evidence when determining damage awards, we will not contravene that state law in a diversity action."

Carota v. *Johns Manville Corp.*, *supra* at 451. In so ruling, the circuit court expressly relied upon and correctly applied the

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[6] Even the petitioner at one point acknowledges that the issue of the admissibility of settlement evidence "was rationally capable of classification as either substantive or procedural." See Petition for Writ of Certiorari, p. 12. It may also be noted, as the circuit court observed, see *Carota* v. *Johns Manville Corp.*, *supra* at 450, that the petitioner had previously conceded that the underlying settlement issue is substantive in nature. In her main brief to the circuit court, the petitioner acknowledged that the settlement evidence issue relates to or arises out of "the parties' substantive right to a full recovery. . . ." See petitioner's main brief to circuit court, p. 20.

principles adopted by this Court in the *Erie Railroad Co.* case and its progeny.

Apart from the fact that the allegation is itself untrue, the petitioner's criticism that the circuit court employed an erroneous test in this case adapted from the case of *Ricciardi* v. *Children's Hosp. Medical Center*, 811 F.2d 18, 21 (1st Cir. 1987) is particularly unfair to the court and inequitable in the circumstances. See Petition for Writ of Certiorari, p. 10. Specifically, the petitioner faults the circuit court for purportedly applying a test other than that set forth in the *Erie Railroad Co.* and the *Hanna* cases. See Petition for Writ of Certiorari, p. 10 ("Instead, the court applied a different test: whether the federal rule 'impinge[d] on some substantive state policy embodied in the state rule.' "), quoting *Carota* v. *Johns Manville Corp., supra* at 450-451. In her main brief to the circuit court, however, the petitioner argued that this exact same language represented a standard applicable to her appeal. See petitioner's main brief to circuit court, p. 24 ("[T]he question is whether the federal rule, in this case, Rule 408, 'impinges on some substantive state policy embodied in the state rule.' *Id.* 811 F.2d at 21."). The petitioner should not be heard to complain that the circuit court employed particular language in its decision which it had been invited to consider in the first instance by the petitioner herself. As this Court declared in *Davis* v. *Wakelee*, 156 U.S. 680, 689 (1895), "[i]t may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position . . . ." See also *Patriot Cinemas, Inc.* v. *General Cinema Corp.*, 834 F.2d 208, 212 (1st Cir. 1987) (equity "precludes a party from asserting a position in one legal proceeding which is contrary to a position it has already asserted in another."); *Allen* v. *Zurich Ins. Co.*, 667 F.2d 1162, 1166 (4th Cir. 1982) ("[A]

party may properly be precluded as a matter of law from adopting a legal position in conflict with one earlier taken in the same or related litigation."); *Jett* v. *Zink*, 474 F.2d 149, 154-155 (5th Cir. 1973) (party precluded from asserting position on appeal inconsistent from that taken in earlier appeal of same case); 1B *Moore's Federal Practice* ¶ 0.405[8] at 240 (1988 ed.) (judicial estoppel may operate "to preclude changes in position in successive stages of the same litigation . . ."). See analogously *Crenshaw* v. *Quarles Drilling Corp.*, 798 F.2d 1345, 1347 (10th Cir. 1986); *Richardson* v. *Turner*, 716 F.2d 1059, 1061 (4th Cir. 1983); *Alexander* v. *Town & Country Estates, Inc.*, 535 F.2d 1081, 1082 n.1 (8th Cir. 1976).

The circuit court in *Carota* appropriately deferred to Massachusetts substantive law in affirming the admissibility of the pretrial settlement evidence in this case. The Massachusetts Supreme Judicial Court has identified "the introduction of settlement agreements in evidence at trial" as "a longstanding principle." *Franklin* v. *Guralnick*, 394 Mass. 753, 755, 477 N.E.2d 405, 406 (1985). See *Boston Edison Co.* v. *Tritsch*, 370 Mass. 260, 266, 346 N.E.2d 901, 905 (1976); *Tritsch* v. *Boston Edison Co.*, 363 Mass. at 182, 293 N.E.2d at 267; *Wadsworth* v. *Boston Gas Co.*, 352 Mass. 86, 94, 223 N.E.2d 807, 813 (1967); *Daniels* v. *Celeste*, 303 Mass. 148, 152, 21 N.E.2d 1, 3 (1939); *O'Neil* v. *National Oil Co.*, 231 Mass. 20, 28-29, 120 N.E. 107, 110 (1918); *Holleman* v. *Gibbons*, 27 Mass. App. Ct. 563, 570, 541 N.E.2d 345, 349 (1989); *Muzichuk* v. *Liberty Mutual Ins. Co.*, 2 Mass. App. Ct. 266, 276, 311 N.E.2d 558, 563-564 (1974). In the *Franklin* case, the Massachusetts high court indicated that this evidence is considered so important that the jury's deliberations may be interrupted to inform them of a settlement negotiated by a co-defendant and the plaintiff during the course of jury deliberations. *Franklin* v. *Guralnick*, 394 Mass. at 755-756 and n.7, 477 N.E.2d at 406-407 and n.7.

The substantive policies underlying this longstanding state rule are not limited merely to preventing a "double recovery" by plaintiffs as the petitioner alleges. See Petition for Writ of Certiorari, pp. 10-11. This rationale could easily be satisfied by having the court clerk perform the mathematical calculation of subtracting a settlement sum from the jury's verdict, a readily apparent point which could not have escaped the attention of the Massachusetts appellate courts over the many years.[7] Rather, the substantive policies underlying the Massachusetts rule regarding the admissibility of settlement evidence also concern questions of the mitigation of damages and the recovery of interest on judgments in which settlement monies have been previously received. These additional rationales reflect the fact that the application of interest monies to the jury's verdict prior to the subtraction of a settlement sum can drastically alter the amount of damages payable by non-settling defendants and thus substantially affect the parties' total damages obligations. See *Boston Edison Co.* v. *Tritsch*, 370 Mass. at 266 and n.10, 346 N.E.2d at 905 and n.10 (recognizing that "the specifics of the accounting in a case like the present where there has been substantial delay in the actual recovery [may be significant], and interest factors are of practical importance.").[8]

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[7] In Massachusetts practice, contrary to the petitioner's assertions otherwise (see Petition for Writ of Certiorari, p. 11), the clerks of courts, and not the jury, routinely perform the actual deduction calculations for settlements received from joint tortfeasors. See, e.g., *Boston Edison Co.* v. *Tritsch*, 370 Mass. at 266, 346 N.E.2d at 905.

[8] The substantive policies underlying the Massachusetts rule regarding settlement evidence are thus more involved than those underlying the rule in Mississippi construed in *McHann* v. *Firestone Tire & Rubber Co.*, 713 F.2d 161, 166 (5th Cir. 1983), a case upon which the petitioner has heavily relied. See Petition for Writ of Certiorari, pp. 10, 12. Regardless, this Court has noted that, "[a]s to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting a writ of certiorari." *Ruhlin* v. *New York Life Ins. Co.*, 304 U.S. 202, 206 (1938).

As the circuit court in this case correctly noted, "the decision to grant juries the opportunity to hear settlement evidence reflects a view of that evidence as substantive, because the juries' hearing of this evidence affects the substantive rights of plaintiffs to damages." *Carota* v. *Johns Manville Corp.*, *supra* at 451. The circuit court properly recognized that damages are an element of the plaintiff's case and that the law of damages is substantive. *Id.* at 451. In diversity jurisdiction cases, the federal courts regularly look to state law to ascertain the elements and application of allowable damages. See, e.g., *O'Gilvie* v. *International Playtex, Inc.*, 821 F.2d 1438, 1448 (10th Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988) (application of punitive damages in diversity case governed by state law); *Woodling* v. *Garrett Corp.*, 813 F.2d 543, 557 (2d Cir. 1987) (income taxes and prejudgment interest governed by state law); *United States* v. *City of Twin Falls, Idaho*, 806 F.2d 862, 879 (9th Cir. 1986), *cert. denied*, 482 U.S. 914 (1987) (attorney's fees governed by state law); *Affiliated Capital Corp.* v. *City of Houston*, 793 F.2d 706, 709 (5th Cir. 1986) (item of accrued interest); *Losey* v. *North American Philips Consumer Electronics Corp.*, 792 F.2d 58, 62 (6th Cir. 1986) (tax consequences of damages award); *Hill* v. *Bache Halsey Stuart Shields, Inc.*, 790 F.2d 817, 827 (10th Cir. 1986) (punitive damages); *Smith* v. *Industrial Constructors, Inc.*, 783 F.2d 1249, 1254 (5th Cir. 1986) (income tax); *Aubin* v. *Fudala*, 782 F.2d 287, 289 (1st Cir. 1986) (prejudgment interest); *Willey* v. *Minnesota Mining & Manufacturing Co.*, 755 F.2d 315, 321 (3d Cir. 1985) (loss of earnings).

In the present case, the circuit court correctly recognized that the policies underlying the Massachusetts rule, which permit the jury to hear pretrial settlement evidence, are so closely linked with the substantive measure of damages, that federal courts sitting in diversity must apply the state rule and allow the admission of settlement evidence. The circuit court's deci-

sion was, in all respects, consistent with the established precedent of this Court and should not be disturbed.

Conclusion.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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